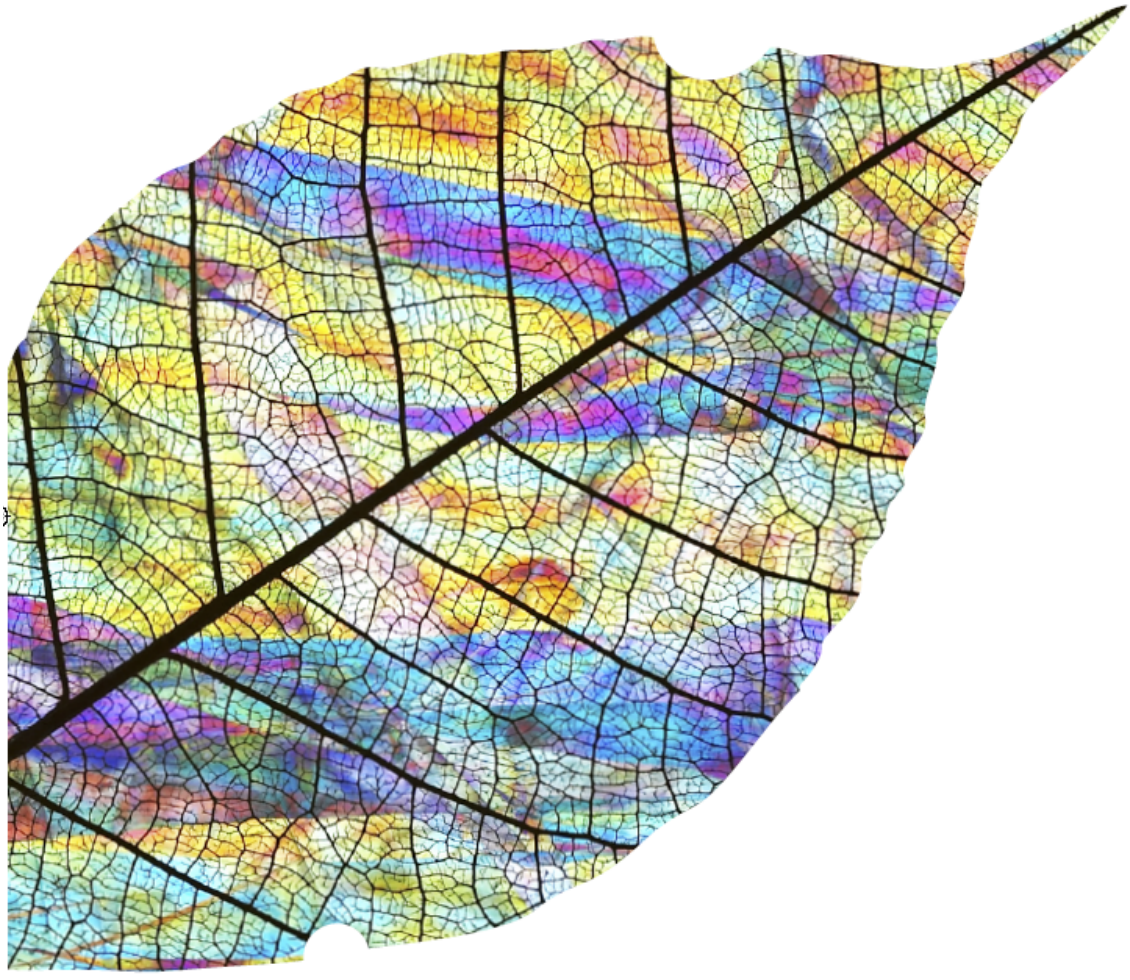
World Universities Comparative Law Project
Legal rating of Spain

carried out by the students at Complutense University of Madrid

A production of the Allen & Overy Global Law Intelligence Unit



June 2015

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The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Spain was carried out by students at the Complutense University of Madrid.

The members of the Faculty of Law at the Complutense University of Madrid who assisted the students were:

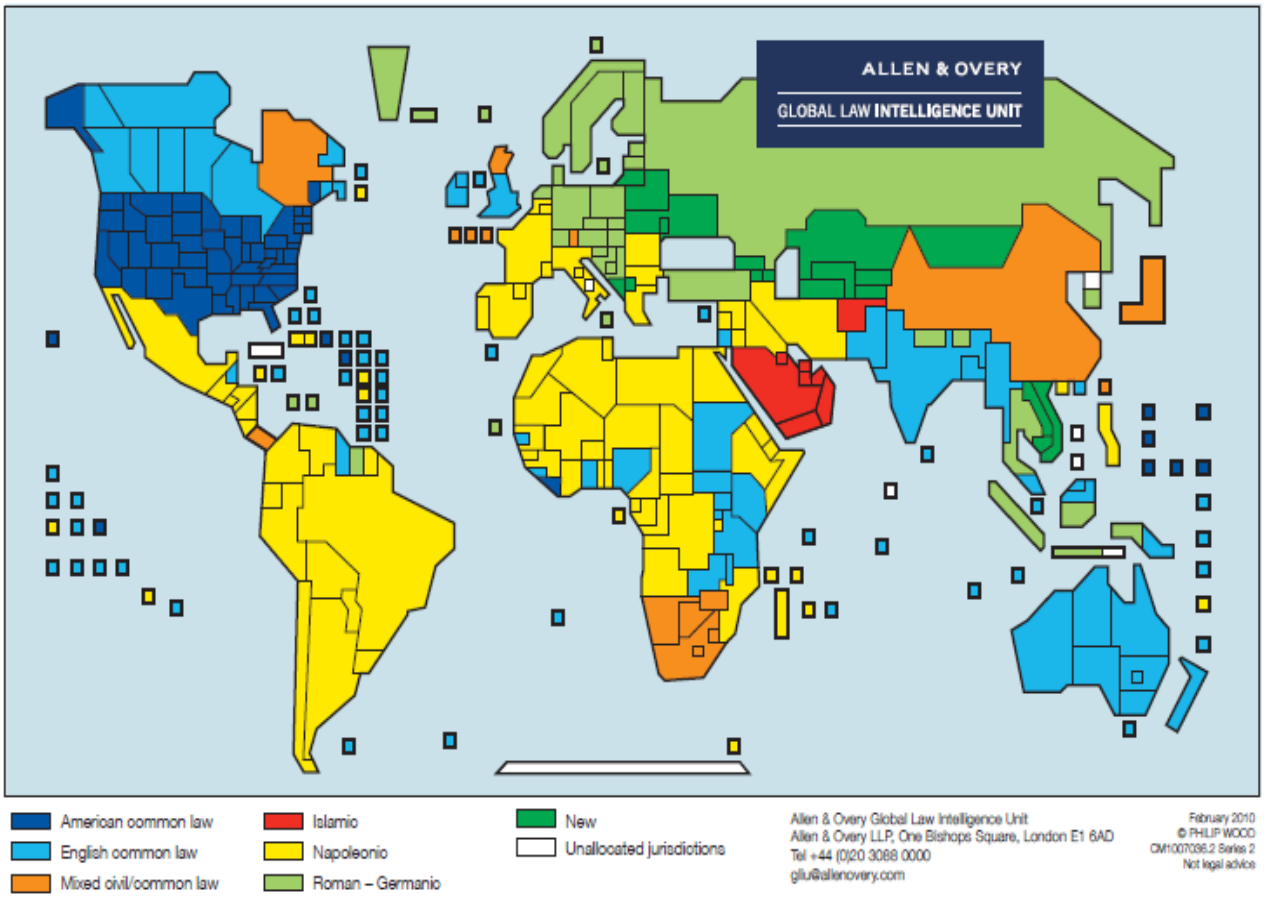
Professor Pedro De Miguel Asensio

Associate Professor Borja Fernández de Troconiz

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

We are pleased to present this legal risk rating of Spain, which is part of a series of similar ratings carried out by students around the world and produced by the Allen & Overy Global Law Intelligence Unit.

Like the other reports of this series, it is based on the use of a colour-coded methodology and the selection of several legal indicators with a view to signalling the main contours of wholesale financial, corporate and related law in Spain, following the approach designed by Philip R Wood QC (Hon), Head of Allen & Overy Global Law Intelligence Unit. This methodology seems very useful not only for providing an overview of the current situation in Spain but also to facilitate its comparison with other relevant jurisdictions.

This national report shows that, in the areas considered, the Spanish legal order is to a great extent influenced by the law of the European Union, which involves common rules for the Member States. Furthermore, Spain has been active in participating in international legal arrangements and in adapting its legislation in order to provide international businesses with a high degree of legal certainty and allow domestic and foreign companies to enjoy the benefits of globalization from their economic activities.

Personally, I would like to express my sincere gratitude to the students who have conducted the study. The three of them were brilliant students on my courses in Private International Law and International Business Law at the Complutense University of Madrid and were happy to be committed to this project from the beginning. During this project I had the opportunity to confirm their talent and dedication. I am also convinced that their discussions with the Allen & Overy partners and associates within the framework of this project will be a very valuable experience for their future.

Pedro de Miguel Asensio
Chair Professor of Private International Law, Universidad Complutense de Madrid
Consultant, Allen & Overy

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Spain with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

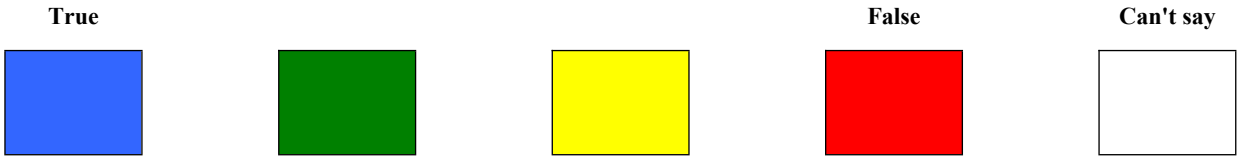
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at Complutense University of Madrid. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of the Complutense University of Madrid, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Spain. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavor to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In Spain, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True			False	Can't say
X				

Comment:

In Spain set-off of mutual debts is forbidden, once insolvency proceedings are declared open, but a set-off whose requisites were fulfilled prior to the declaration shall take effect, although the judicial provision or administrative act declaring such may have been handed down subsequently (Article 58 Act 22/2003 on Insolvency).

On the other hand, in international insolvency proceedings the creditor can set off his claim when the law governing the reciprocal claim of the insolvent debtor allows this in situations of insolvency (Article 205 Act on Insolvency and Article 6 EU Regulation 1346/2000 on insolvency proceedings).

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods

and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In Spain, the law offers a security interest which is highly protective of the secured creditor.

True			False	Can't say
	X			

Comment:

Generally, for the perfection of a security interest over real estate and certain movable assets Spanish law requires its registration according to the Mortgage Law of 1946 and the Chattel Mortgages and Pledges without Delivery of Possession of 1954. The other form of perfection is possession in pledge over movables (Article 1863 Civil Code).

Protection for a secured creditor in a normal situation of a company is higher for credits secured by a pledge or mortgage credit because, according to the Civil Code, these credits will be preferred (Articles 1922, 1923, 1926 Civil Code). However, this form of preference is not absolute: first in the list is credits granted for the construction, repair, conservation or sales price of movable property in the debtor's possession, followed by credits in favour of the State and in respect of the taxpayers' property for the amount of the last annual period accrued and unpaid in respect of any taxes, and credits held by insurers for the insurance premiums relating to the past two years in respect of an insured property and, in the case of mutual insurance, for the last two dividends distributed.

When a company is declared insolvent, the credits secured by a voluntary or legal mortgage, either on movable or immovable assets, or liens on mortgaged or pledged assets and credits guaranteed by a pledge in a public deed or on pledged goods or rights that are in the possession of a creditor or a third party, are classified as credits with special preference (Art. 90 Act on Insolvency). However, there is some controversy regarding security over future credits. It is to be noted that security trustees are not recognized and that due to the doctrine of specificity it may be difficult to cover future assets. Moreover, enforcement is usually by a public court action.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do

not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 Spain has a universal trust for all assets

True			False	Can't say
			X	

Comment:

The concept of "trusts" does not exist in Spanish law, therefore recognition problems could arise. An example of such problems may be found in, for example, the Judgment 338/2008 of the Supreme Court (30 April 2008). In this judgment the Supreme Court dismissed the validity of a trust because it was deemed incompatible with Spanish inheritance law.

In addition, Spain has not become a party to the Hague Convention on the law applicable to trusts and on their recognition of 1985 and therefore it is not bound by the Convention.

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Spain the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True			False	Can't say
			X	

Comment:

When malicious intent or gross negligence by the directors of a company is behind the generation or aggravation of a state of insolvency the law classifies these actions as tortious. In addition, the law establishes two types of presumptions. Firstly, a non-rebuttable presumption of malicious aforethought or gross negligence which can include situations where the directors breach the obligation to keep accounts or commit a material irregularity impeding adequate comprehension of the subjacent economic or financial situation, or when there is serious misrepresentation in any of the documents attached to the petition declaring the insolvency or they attach false documents, breach the composition for causes due to the insolvent debtor when commencing the winding-up, embezzle some of the assets of the company to the detriment of the creditors or have been detracted during the two years prior to the date of insolvency proceedings. Secondly, rebuttable presumptions of malicious aforethought or gross negligence are established when the directors have breached the duty to petition for a declaration opening the insolvency proceedings, the duty to collaborate with the insolvency court and the insolvency administrators or have not formulated the annual accounts and have not submitted them for audit when the company is legally bound to do so or have not deposited them at the Business Register in any of the three years preceding the declaration of insolvency (Articles 164, 165 Act 22/2003 on Insolvency).

Directors for these purposes are the de facto and de jure managers or liquidators, general proxies and those who have had any such status during the two years prior to the date of declaration of insolvency.

The insolvency court, by its own decision or on reasoned petition by the insolvency administration, may resolve, as an injunctive measure, the seizure of directors' assets and rights. When the proceedings result in a declaration of liability, the directors may be required to make up the deficit which results in the winding up (Article 48 ter Act on Insolvency). Besides, if the ruling declares the insolvency to be tortious, directors could be barred from administering third party goods for a period of 2 to 15 years, as well as from

representing or managing any person during that same period, bearing in mind the severity of the facts and the scope of the damage, as well as whether they have acted tortiously in other insolvencies (Articles 172, 173 Act on Insolvency).

Moreover, when the Classification Sections has been formed or reopened as a result of commencement of the winding up phase, the court shall require the directors to fully or partially cover the deficit. If there are several parties being sentenced, the judgment shall individually state the sum to be paid by each of them, according to their participation in the events that have led to the insolvency (Article 172 bis Act on Insolvency).

In any case (fortuitous or tortious insolvency), the consequences for the directors that Spanish law establishes are that the claims held by them become subordinated claims (Article 92. 5º Act on Insolvency). However, a recent reform (Royal Legislative-Decree 17/2014, 30 September 2014) expressly provides that those who have acquired the status of partners under the agreed debt capitalisation in the context of a refinancing operation will not be considered to be persons especially related to the insolvent debtor to enable them to subordinate their claims as a result of the refinancing operation.

Additionally, the fact that the directors can be made to cover the deficit does not preclude them from being subject to actions under company law for damages caused to the company.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 Spain permits a company to grant financial assistance for the purchase of its own shares.

True			False	Can't say
		X		

Comment:

The answer depends on the type of company.

Limited liability companies may not provide financial assistance for the acquisition of their own shares or stakes created or shares issued by any company belonging to their group.

Joint stock companies may not provide any type of financial assistance for the third party acquisition of its shares or its parent company's stakes or shares. However, the prohibition does not apply to: firstly, transactions enabling company employees to acquire company shares or stakes or shares in any other

company belonging to the same group; and secondly, bank and other financial institution transactions conducted within the scope of their ordinary business in pursuit of their corporate purpose, whose cost is booked against the company's freely disposable assets. In addition, the company must comply with certain conditions and establish a reserve on its balance sheet equal to the amount of any loans booked as assets (See Chapter 6, Royal Legislative Decree 1/2010, of 2 July, approving the consolidated text of the Corporate Enterprises Act).

Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Spain is open and has few restrictions.

True			False	Can't say
		X		

Comment:

The Spanish Royal Decree containing the relevant rules in this area is based on European Directive 2004/25/EC on takeover bids. This Directive establishes minimum requirements for transparency and regulates takeover bids involving the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market. According to Royal Decree 1066/2007, a mandatory bid must be made by a natural or legal person who holds securities of a company when they are admitted to trading on a regulated market in Spain, and added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly, give him/her an equal to or higher than 30% of voting rights in that company, giving him/her control of that company. The other case is when the natural or legal person has reached, directly or indirectly, a percentage of less than 30% and appoints, in the 24 months after the acquisition of that percentage, a number of board members that represent more than half of the members of the administration board of the company. The National Securities Commission (*Comisión Nacional del Mercado de Valores*) can exempt this obligation if some conditions are fulfilled and there are derogations for some types of companies (Articles 4, 8 RD 1066/2007).

On the one hand, the limitations for the offeror are set out in Article 32 of RD 1066/2007. The offeror shall not publish any information that is not in the content of the offer document, from the publication of the offer until the presentation of the takeover bid. In a mandatory bid, the offeror cannot exercise political rights up to the share threshold that obliges him/her to make a bid and meanwhile the bid will not be accepted by the National Securities Commission (Article 26 RD 1066/2007). Thirdly, where the consideration offered by the offeror does not consist of liquid securities admitted to trading on a regulated market, it shall include a cash

alternative. The offeror shall offer a cash consideration at least as an alternative where he/she or persons acting in concert with him/her, has purchased for cash securities carrying 5% or more of the voting rights in the offeree company; in the case of a mandatory bid when control is achieved; in the case of exchange, unless offered in exchange securities admitted to trading on a Spanish official secondary market or other regulated market of a Member State of the European Union, or values to be issued by the offeror company itself, provided that in this case, its capital is wholly or partly accepted to trading on any of these markets and that the bidder acquires the express undertaking that the application for admission to trading of the new values takes place in a period of three months from the publication of result of the offer (Article 14.2 RD 1066/2007). The offeror must provide the National Securities Commission with complementary documents (Article 20 RD 1066/2007 and see Annex of RD 1066/2007 for details on the offer document). If the takeover implies a concentration, the offeror shall notify the competition authorities.

Additionally, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders for this purpose before taking any action, which may result in the frustration of the bid and in particular before the issuance of any shares, which may result in a lasting impediment to the offeror acquiring control of the offeree company. The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based.

The tender offers in mandatory bids must be conducted with a price or consideration that is at least the highest consideration that the offeror or persons acting in concert with him have paid or agreed to, during the 12 months prior to the announcement of the takeover. Specifically, certain regulatory rules for special cases nuance the equitable price, for example where the purchaser was executing an option right prior to purchase or sale, in the case of other derivative financial instruments, in cases where the exercise prices are calculated in respect of a number of operations, and when the acquisition of the securities has been carried out through an exchange or conversion, etc (Article 9.2 RD 1066/2007). Besides, the National Securities Commission may amend the price calculated in several circumstances, such as where the market price of the securities in question has been manipulated, where the market price in general or certain market prices in particular have been affected by exceptional occurrences, or in order to enable a firm in difficulty to be rescued. In addition, the bidder must demonstrate to the National Securities Commission the establishment of safeguards to ensure compliance with the obligations resulting from the offer (Article 15).

Finally, the right of squeeze-out is available where the offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in the offeree company (Article 47 RD 1066/2007).

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in

business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In Spain, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True			False	Can't say
X				

Comment:

If the parties expressly state that the terms are subject to contract, they are not bound by the heads of terms, which therefore do not give rise to obligations, but heads of terms could be relevant to the interpretation of the contract.

According to the Civil Code, to bind the parties, contracts have to enter into full force and effect upon mere consent and the parties have to act in good faith. Therefore the Supreme Court has ruled that pre-negotiations ("*tratos preliminaries*") do not entail damages, unless bad faith exists (STS 8304/2012, 14th December 2012).

Pursuant to Article 1262 of the Civil Code, consent is manifested by the coincidence between the offer and the acceptance over the thing and the cause which are to constitute the contract.

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In Spain, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True			False	Can't say
	X			

Comment:

Freedom of contract under Art.1255 of the Civil Code allows the parties to include a termination clause in contracts, therefore tribunals will usually uphold such a clause provided that it is not contrary to the law, to morals or to public policy. If the parties do not establish a clause, Art.1124 of the Civil Code lays down that "the power to terminate obligations is deemed to be implied in reciprocal obligations, where one of the obligors should not perform his obligation."

However, the event has to be essential for the termination of the contract. In particular, the Supreme Court (Section 1ª) (Judgment n. 741/2014 of 19 December) has ruled in a delivery of goods judgment that if the delivery deadline for the sale of goods is considered essential, it is clear that only the party suffering the breach can apply for successful termination of the contract, but that does not mean in cases in which that term has not been established as essential, that the aggrieved party will be forced to endure any delay indefinitely, so the circumstances will therefore determine whether the breach will allow the contract to be terminated.

Hence if sophisticated parties have contractually agreed to consider a breach eligible to permit termination of the contract, Spanish courts will uphold such termination in case of breach without assessing its materiality. However, regarding mortgage backed loans, we would like to note that Article 693.2 of the Civil Procedure Act only allows the claim of the entire amount owed for principal and interest if termination had been agreed in the case of default in paying at least three monthly instalments by the various deadlines. This article was reformed by Law nº 1/2013. The judgments of the Supreme Court of 17 January 2011; 27 March 2009; and 4 July and 12 December 2012 confirm their effectiveness, based on the usages of commerce and usage in recent banking practice, provided there are sufficient grounds for it, these being where there is a real and manifest failure to meet obligations of the necessary kind, among which is undoubtedly the failure by the borrower to make loan payments by instalments, because that is the only obligation on a debtor to repay the amount, as recently noted by the Audiencia Provincial of Barcelona (Section 13ª) in its Judgment n.244/2014.of contract under Art.1255 Civil Code.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In Spain, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True			False	Can't say
X				

Comment:

In Spain, Civil Law is governed by the principle of the autonomy of the will of the parties in contracts, in the sense that the parties may decide the content of the contract. As already noted, the Civil Code stipulates in article 1255 that the contracting parties may establish covenants, clauses and conditions of their own choosing, provided they are not contrary to law, morals or public order.

This is the general rule, so that, in principle, exclusions of liability clauses are allowed in most commercial contracts between sophisticated companies. However, these kinds of provisions are prohibited in certain

situations where there is a clause which allows the exclusion of liability in cases of malice aforethought breach. This exception appears also in Article 1102 of the Spanish Civil Code, which states that liability arising from malice aforethought is unenforceable in all obligations, so that the waiver of an action to make this liability effective is void.

Therefore, apart from some cases where there has been malice aforethought, exclusions of liability are allowed in most commercial contracts due to the principle of the autonomy of the will of the contracting parties.

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Spanish courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Spanish public policy and mandatory statutes.

True			False	Can't say
X				

Comment:

In Spain, as an EU Member State, Regulation 593/2008 (Rome I) on the law applicable to contractual obligations replaces Article 10.5 of the Spanish Civil Code. Article 3.1 of the Rome I Regulation provides that a contract shall be governed by the law chosen by the parties, and that that choice should be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of the contract. Additionally, the parties may at any time agree to subject the contract to a law other than that which previously governed it.

Moreover, in accordance with Article 2 of the Rome I Regulation, the chosen law shall be applied whether or not it is the law of a Member State, so it is irrelevant that the contract does not have any connection with the foreign jurisdiction whose law is chosen by the parties. However, there are some restrictions on this express choice of foreign law, as Article 9 establishes that nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum, which are provisions the respect for which is regarded as crucial by a country to safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable in any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation. In addition, this restriction is also mentioned in Article 21, which prescribes that the application of a provision of the law of any country specified by the Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

Pursuant to Article 281.2 of the Civil Procedure Act, foreign law shall be object of proof in the relevant proceedings. If the parties do not sufficiently prove the content of the foreign law, Spanish law will apply.

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Spanish courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True			False	Can't say
X				

Comment:

Article 25 of Regulation (EU) 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Brussels I bis) allows a clear submission between the parties to the jurisdiction of the courts of any Member State, even if none of the contracting parties is domiciled in a Member State of the EU.

In accordance with the above-mentioned provision (Article 25), if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. This clause can operate even if there is no connection between the country whose jurisdiction has been chosen and the contract.

Moreover, an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, so the validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often

enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Spain, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Spanish courts.

True			False	Can't say
X				

Comment:

Regarding international arbitration, Spain is part of the New York Arbitration Convention of 1958, which allows the recognition and enforcement of arbitral awards made in the territory of a State other than a State where the recognition and enforcement of such awards are sought. The Convention applies to the recognition and enforcement of awards in Spain even if they have been made in States that are not party to the New York Convention

Article 2 of the New York Convention provides that each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning subject matter capable of settlement by arbitration. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. In these cases, the court of a Contracting State shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The provisions of the Spanish Act on arbitration (*Ley 60/2003, de arbitraje*) are consistent with the New York Convention and are to a great extent based on the UNCITRAL Model Law on Commercial Arbitration.

Therefore, the Spanish courts will allow contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Spanish courts, provided there is an agreement in writing which is fully applicable, thus recognising and enforcing foreign arbitral awards.

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In Spain, class actions where the class is bound if they do not opt out are generally not allowed.

True			False	Can't say
		X		

Comment:

Class actions were regulated for the first time in the Spanish legal system within the Civil Procedure Act of 2000. In this regard, by exercising an action of this kind, an association of consumers and users, an affected group or a legally constituted entity for the protection of consumers and users can legally claim

compensation for the group of people affected by the same harmful event. Therefore, class actions are recognized in the Civil Procedure Act to provide compensation for damage suffered by consumers and users.

Nevertheless, the regulation of class actions does not provide for a mechanism to opt out, which is a process by which individual consumers represented by the association refuse to take part in the initiated action and forgo the exercise of eventual individual action.

However, the Civil Procedure Act does provide for a binding intervention mechanism (opt-in), regulated in Article 15, establishing that in proceedings brought by associations or entities constituted for the protection of the rights and interests of consumers and users or groups affected, those who have suffered damage due as consumers of the product or as users of the service which gave rise to the proceedings shall be called to appear in order to assert their individual rights or interests.

Article 221 of the Civil Procedure Act deals with judgments issued in proceedings brought by consumer or user associations. Any such judgments are subject to the following rules:

(A) Should a monetary sanction have been sought for doing or failing to do a specific or generic thing, the judgment upholding the claim shall individually determine the consumers and users who shall be deemed as benefiting from the judgment in keeping with the laws protecting them?

Where individually determining such users or consumers may not be possible, the judgment shall set forth the necessary details, characteristics and requirements to enforce payment or, as appropriate, apply for enforcement.

(B) Should a specific activity or type of behaviour be judged illicit or not in keeping with the law as the grounds for the sanction or as the main or single verdict, the judgment shall determine whether such verdict shall have procedural effects beyond those who had been a party to the corresponding proceedings.

(C) Should individual consumers or users appear in court, the judgment shall expressly issue a ruling on their pleas.

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Spain nationals and local corporations are entitled to own land absolutely.

True			False	Can't say
X				

Comment:

In Spain, there are no restrictions on property rights, so foreign citizens have the same property rights as Spanish citizens.

Property or ownership rights are recognised in the Spanish Constitution of 1978, whose Article 33 lays down that the right to private property and inheritance is recognised. However, the social function of these rights shall determine the limits of their content in accordance with the law. No one may be deprived of his property and rights except for justified cause of public utility or social interest after proper indemnification in accordance with the provisions of law.

On the other hand, Article 348 of the Spanish Civil Code defines property as the right to enjoy and dispose of goods without restriction other than those established by the law, and Article 38 establishes as a general principle the right of any legal entity to acquire and own any kind of goods, save for public domain assets.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in Spain is registered in a land register which records most major interests in land, eg ownership, mortgages and longer term leases.

True			False	Can't say
X				

Comment:

Though in theory it is not really necessary to register title to land on the land register, most land is registered in order to produce effects on third parties. In this sense, the registration of a land in the register is used to justify that the title or land registered really exists and belongs to its owner, because otherwise a non-registered land title will not be effective against third parties, which means that, in the event of any kind of opposition or disturbance of the right by a third party, the owner could not take legal action to defend his rights as if they had been registered in a land register.

In practice a distinction has to be made between urban and rural land. By contrast with urban zones, in rural areas the land register may not be updated and identification of property and right holders may not be as precise as in urban areas.

Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Spain, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True			False	Can't say
			X	

Comment:

In Spain, commercial development and changes in the use of land are subject to a strict regime, and such changes can only operate within the limits set by the Urban Development Plan. Article 3 of the Land Act stipulates that the urban planning authorities organise and define the use of land in accordance with the general interest, determining the powers and duties of ownership. This determination does not confer a right to claim compensation, except where expressly established by law.

The Urban Development Plan establishes different kinds of uses of land, depending on its physical location and regardless of the purpose of such land: rural or urban.

Regarding rural land, article 12.2 of the Land Act defines rural land as land which has been preserved by urban planning of any transformation through construction. Hence, rural land is land which is not allowed to be used for a non-rural purpose.

On the other hand, Article 12.3 of the Land Act provides that the urban land is that in which land shall be given over to urban use and changes are subject to those limitations established by the Plan.

Acts contravening the Plan are deemed automatically void.

Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In Spain, there are few controls on hiring and firing employees or on the terms of employment.

True			False	Can't say
			X	

Comment:

Employment contracts in Spain are regulated by Legislative Royal Decree 1/1995 24 of March, approving the Worker's Statute, and also by collective bargaining agreements and other collective agreements. Labour legislation has been adapted in recent years to special economic circumstances by Law 3/2012 of 6 July on Urgent Measures to Reform the Labour Market. The reform aims to establish a more efficient management of relationships between worker and employer and to foster job creation and stable employment. Two changes have been adopted in the past five years: the notice period applicable in the case of redundancy dismissals was reduced (2011) and the duration of fixed-term contracts was modified in a way that the period between 31 August 2011 and 31 December 2012 does not count for the purpose of the limit established by law for these types of contracts. However, our labour market regulations are still considered rigid. They provide a strong protection for workers' rights but they also hinder a free contracting environment. There are multiple controls that prevent hiring and firing in a flexible way compared to other similar countries

Hiring is subject to some restrictions. For instance, fixed-term contracts are prohibited for permanent jobs, and the hiring of workers in order to lend them temporarily to another company may only be conducted by duly-authorised temporary employment agencies (ETT).

The employer is heavily restricted when it comes to firing employees in Spain, being required to pay severance costs, even when the reason for the dismissal is an objective ground such as supervening ineptitude of the worker or ineligibility for the post after his effective placement in the company (article 52 a) of Worker’s Statute). The severance pay is often impossible to afford for some employers. The only exception is when the employee has been dismissed for reasons of "disciplinary action" (such as repeated and unjustified absenteeism) and the dismissal is recognised as "justified" afterwards. It is alleged that these difficulties in firing employees lead employers to hire less than in other less controlled environments.

On the other hand, there are many regulations that protect workers' rights and control employers’ power. Minimum conditions of employment are fixed by law and therefore out of the free disposition of the contracting parties who cannot agree worse conditions for workers, but can always improve them. For instance, they cannot relax restrictions on night work or remove the mandatory entitlement to a minimum of one and a half days off per week. It is also to be noted that employers and employees must compulsorily pay contributions into the social security system, and this cannot be changed by the contracting parties.

Environmental restrictions

Q18 In Spain the rules governing the environment and liability for clean-up are very light and relaxed.

True			False	Can't say
			X	

Comment:

As a result of the growing interest in the protection of the environment, Spain has been enforcing a vast number of regulations in the last few decades whose purpose is guaranteeing sustainable development by protecting the air, the water and the soil. Several of these regulations have their origin in the implementation of European Union regulations and international treaties.

These regulations prevent pollution by establishing *a priori* controls on potentially polluting activities but also envisage a liability scheme for cases in which pollution events happen.

The current environmental liability regulations in Spain have their origin in the implementation of Directive 2004/35/CE, of 21 April 2004, which regulates environmental liability on the basis of the principle "polluter pays" (this Directive was implemented in Spain by Law 26/2007, of 23 October 2007).

It should be noted that the protection of the environment is not left to administrative law alone. Indeed, certain damage caused to the environment is considered a criminal offence, in accordance with what is envisaged in Title XVI, Chapter III of the Spanish Criminal Code (articles 325 et seq).

Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In Spain foreigners may freely own and control local companies outside protected industries, such as media, banks and defence

True			False	Can't say
	X			

Comment:

Royal Decree 664/1999 adapted Spanish domestic law to the rules on the freedom of movement of capital of the European Union and deregulated almost every foreign investment transaction. As a general rule, foreign investments must be reported after the investment has been made. There are some exceptions:

Investments from tax havens, which must be notified beforehand. This prior disclosure obligation is not equivalent to a previous authorisation, since the investor can make its investment without having to wait for any reply from the authorities.

Some specific industries such as: defence, energy, air transportation, radio, television, gambling, telecommunications or private security, or minerals of strategic interest, are subject to restrictions on foreign investment.

Some regulated investments are: participation in Spanish companies and the establishment and increases in capital allocated to branches, etc. A complete list of regulated investments and reporting obligations is published; every foreign investment not included in that list (such as equity loans) is totally deregulated, and no communication is required in relation to them.

Depending on the means of investment, public deeds must be issued before a Spanish notary such as a certificate of incorporation when a company or corporation is established. Afterwards, these public deeds are required for entry into the proper Commercial Registry. There are also official forms relating to foreign

investments, such as the D1-A form, which must be submitted to the General Directorate of Trade and Investment of the Ministry of Economy and Competitiveness.

In conclusion, these investments are generally free and deregulated. As an example of this, we can take data from 2014, when the two major Spanish banks (Santander and BBVA) were 85% controlled by foreign investors. Their dominant shareholders are located in France and U.S. In respect of Santander, Spain holds sixth position in terms of shareholder control, representing only 5% of the shares. These banks, along with Telefonica, turn out to be the top three local companies with a foreign presence.

Exchange controls

Q20 In **Spain**, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True			False	Can't say
X				

Comment:

The main regulations regarding exchange controls are governed by Law 19/2003 on Capital Movements and Foreign Transactions and Anti-Money Laundering and in Royal Decree 1816/1991 on Economic Transactions Abroad. These instruments follow the principle of the deregulation of capital movements.

Exchange controls are also regulated by Ministerial Order of 27 December, 1991, issued by the Ministry of Economy and Finance and developed by the Notice 4/2012, of 25 April, issued by the Bank of Spain, on compulsory communications residents must submit in relation to economic transactions and financial assets and liabilities conducted abroad. Equally, credit institutions and other financial entities are subject to similar obligations related to reporting concerning financial operations, according to Law 10/2010. Additionally, UN Security Council Resolutions and certain EU Regulations could apply financial measures against third countries considered at a higher risk of money laundering, terrorism funding or the proliferation of mass destruction weapons. These measures could include bans, restrictions or conditions on the movement of capital and certain transactions with certain countries.

There is freedom of action in this matter as a general rule. Payments or receipts, transfers to or from abroad, and changes in accounts or financial debit or credit positions abroad, can be freely carried out. In this sense, businesses and transactions between residents and non-residents are not restricted. Payments and receipts between residents and non-residents can be made in Spain or abroad in coins, banknotes and bank cheques to bearers, in Euros or foreign currency, and must only be reported by the resident if they exceed €6,000 (in general terms). However, some safeguard clauses exist, for instance EU rules or the Spanish government can restrict the performance of certain transactions or suspend their deregulation as an exceptional measure.

The only documents that non-residents must provide is evidence of their non-resident status and other minor formalities, in order to hold a bank account in Spain on the same conditions as resident individuals. Likewise, residents can freely open bank accounts abroad either in euros or in foreign currency, they only need to declare this to the Bank of Spain when the account opened. Moreover, residents can always hold foreign current bank accounts in Spain at registered institutions without any reporting requirement, apart from the periodic reporting obligations required for foreign transactions made by Spanish residents that exceed the high thresholds established by Notice 4/2012 issued by the Bank of Spain .

Nevertheless, there are certain formalities to observe for payments to and receipts from abroad, in order to maintain control over taxes and tax monetary flows. As a general rule, these transactions must be made through registered institutions, to which the resident must provide certain data and a description of the transaction. Furthermore, debit and credit activity in bank accounts held abroad by residents must be notified if they exceed a certain amount.

Finally, in the context of anti-money laundering the export (and also the import by non-residents in certain cases) of coins, banknotes and bank cheques to bearers is subject to prior administrative disclosure for information purposes if the amount exceeds €10,000 per individual per trip.

Alien ownership of land

Q21 In Spain, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True			False	Can't say
X				

Comment:

In recent years, with the progressive decline in real estate prices in Spain, the number of foreign investors interested in acquiring any kind of property is increasing. There are no restrictions or permits required in Spain for property rights, independently of where the foreign citizen or company comes from: and whether a member of the EU or not. Procedures and formalities in order to own land or real estate by foreigners are simple:

(A) NIE (Foreigners Identification Number) is required for individuals and NIF (Tax Identification Number) for legal entities. They can be requested at any government office. This paperwork can even be processed from abroad. Moreover, real estate agencies usually provide help in this matter when purchase and sale is being accomplished through them.

(B) Holding a Spanish bank account is never compulsory but always recommended because buyers' means of payment need to be accumulated in the account. It also facilitates the payment of maintenance costs and real estate taxes (such as IRNR: non-residents' income tax).

(C) Foreigners can turn to the same sources of funding as residents if financial support is needed. Some specific foreigner mortgages are also available, but always on the same financial conditions applied to Spanish citizens. The economic situation of a company and its level of stability is controlled by the bank as in any similar financial operation.

The remaining formalities are exactly the same as any national company needs to achieve when buying a property: to hand over a deposit, to raise money, to contract; to formalise a purchase; to procure a notary and to register the real estate on the Property Register. When it comes to leasing, formalities are even more relaxed and less complicated, and the same rules apply to foreigners as to national individuals and companies.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In Spain, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True			False	Can't say
X				

Comment:

Firstly, Article 24.2 of the Spanish Constitution explicitly recognises the right to a predetermined judge by law, in order to prevent "ad hoc" tribunals, and the right to trial with all guarantees, including the constitutional doctrine of the right to a fair trial.

Secondly, as a country member of the EU, some resolutions of the Spanish courts need to be in agreement with European law. Therefore, when it comes to practice, Spanish resolutions cannot be biased or unfair to foreign businesses in any way, especially when the matter is related to a company from another EU country, which is more likely to be controlled by the European Union courts in favour of equal rights where the law is applied no matter what the country of origin.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Spain are not considered materially greater than in other comparable countries.

True			False	Can't say
	X			

Comment:

Considering litigation delays, the Spanish Constitution establishes in Article 24.2 the right to a public trial without wrongful delay and with all proper guarantees. It is also important to consider that Spain has one of the highest litigation rates among OECD countries, which is due to the frequency of disputes between individuals and companies. Specifically, Spain is the third highest country in terms of litigation cases, according to a report conducted in 2013 by the Bank of Spain, with a litigation rate of more than four cases per 100 inhabitants. It is also believed that the recent economic crisis has influenced these data, since economic events create difficulties in fulfilling contractual requirements.

The number of cases has a strong influence on the time litigation takes. There are several alternative routes in order to avoid commercial litigation such as mediation and arbitration which help to reduce delays and lower costs.

The response rate represents the average time a court needs in a particular country in order to render a judgment. Despite its high litigation rate, Spain is well placed when it comes to response time at first and second instance, compared to similar countries. According to this study, the global average response rate is 238 days at first instance, and Spain is placed just above this number (274), which means a better position than countries like France or Great Britain and well above Italy and Portugal, countries with especially high litigation response rates. Spanish second instance cases have an even better response time. This is a sign that

our judicial system is capable of supporting the functioning of markets. However, regarding new technologies, Spain still remains below the average.

This is also related to litigation costs, which tend to be greater when the case is extended in time. Generally, litigation costs in Spain are reasonable compared to other EU countries, and lower than in some countries like Germany or Austria, where court fees are much higher. In spite of the recent rise in court fees in our country and their extension to individuals, they still represent only 10% of litigation costs, and some of these costs are liable to be returned if the plaintiff wins the case. The average court fees paid by plaintiffs is around 29% among EU countries, according to the Council of Europe. Moreover, the legislation on Free Legal Assistance allows free access to justice for people on lower pay according to an index which is updated change annually. Costs awarded to the prevailing party, lawyers and court agents are calculated in accordance with the local criteria.

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True **False** **Can't say**

X

Commentary and suggestions for change

The overall assessment of Spanish legislation in the fields of wholesale finance, corporate law and business transactions is that in general terms it is liberal and open and provides a high level of legal certainty to businesses and investors. This is in line with the position of Spain as a Member State of the European Union. Approximation of laws and even unification by means of regulations within the EU are significant in the main areas considered. Intense legal intervention in the topics covered by the survey is limited to certain areas where a particular need to safeguard public and social interests exists and justifies specific legal constraints. This is the case in particular with respect to land development restrictions, employment law and environmental restrictions.

In general terms such restrictions seem justified in order to achieve the protection of the relevant public and social interests. Notwithstanding this, it should be stressed that Spanish labour market regulations may still be regarded as too rigid. Those regulations provide strong protection for workers' rights but they may also excessively hinder the contractual environment in the labour market.

From the perspective of legal certainty and predictability, a criticism may be raised with regard to the great number of piecemeal amendments introduced in recent years in the legislation concerning some of the main areas of the survey, particularly company law and insolvency law. Although many of those changes are closely related to the reaction against the recent crisis, most of them were adopted in a very short period of time and so may undermine predictability and tend to be a source of confusion.

With regard to the application of the law, the overall assessment is positive as well. In this respect, it is noteworthy that when compared with similar countries, Spain is well placed when it comes to response times at first and second court instances. Furthermore, the conclusion has been reached that in practice Spanish courts are not biased or unfair to foreign businesses.

A suggestion for the future relates to the need to improve the availability of Spanish legislation in the current context of globalisation in order to increase transparency and to favour access to legislation by foreign business and investors that may be interested in the Spanish market. From this perspective, it seems appropriate to stress that a bigger effort by the Spanish authorities to provide open Internet access to official English translations of Spanish legislation seems appropriate, even if the situation in this regard has improved in recent years.

Profiles

The survey was carried out by the following students:

Briseida Sofía Jiménez Gómez is a first year doctoral student at the Complutense University of Madrid, pursuing the degree of Ph.D. in the field of Private International Law. She was granted a LLM degree, Master of European Law at the College of Europe (Brugge) in 2014. Previously, she obtained two degrees in Law and Business Administration in Spain, with an exchange year at Strathclyde University in Glasgow.

Elisa Martín Vega is a final year student at the University of Valladolid (Spain), pursuing the double degree of Law and Business Administration and Management. She has taken part in student exchange programmes with San Diego State University (USA) in 2013 and with the Complutense University of Madrid, where she became involved in this project.

Gonzalo Castro Sáenz del Castillo is a final year student at the Faculty of Law of the Complutense University of Madrid, pursuing a Bachelor Degree in Law. He has great interest in competition law and market regulation and is planning to pursue a Master of Laws (LLM) in European Law after graduation.

Allen & Overy Global Law Intelligence Unit

The Allen & Overy Global Law Intelligence Unit is part of the international firm of Allen & Overy and produces papers, surveys and other works on cross-border and international law within the field of its practice. Allen & Overy is one of the largest legal practices in the world with approximately 5,000 people, including some 512 partners, working in 40 offices worldwide. For further information, please contact Philip Wood, philip.wood@allenovery.com or Melissa Hunt, melissa.hunt@allenovery.com.

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Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

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